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ABSTRACT

This manual is designed to provide educators, primarily administrators, with basic legal information on issues concerning student rights in North Dakota. Chapters are presented on (1) the right to an education, (2) the freedom of religion, (3) the right to privacy (in school records and in searches), (4) freedom of expression (in general, in publications, and in curriculum and book selection), (5) the right to a safe environment (protection from negligence), and (6) the rights to substantive and procedural due process in matters of student discipline. Each chapter is arranged in a question-and-answer format, though the answers to many of the questions are not certain, due to constant change and new developments in this area of law. Citations are included from court cases, statutes, and federal regulations. (TE)

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GUIDE TO STUDENT RIGHTS IN NORTH DAKOTA

Julie Underwood O'Hara

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GUIDE TO STUDENT RIGHTS IN NORTH DAKOTA

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University of North Dakota
Grand Forks, North Dakota

March, 1984

FOREWORD

School administrators are often faced with legal questions regarding their handling of students. Not all questions have easy answers, and not all answers are always clear-cut ones. This monograph has been published by the Bureau of Educational Research and Services as a sort of guide to be used by school superintendents and school principals as they face situations that may have potential legal ramifications. Julie Underwood O'Hara, the author, is Assistant Professor of Educational Administration at the University of North Dakota. She holds the J.D. from Indiana University School of Law and is, therefore, well qualified to deal with this topic.

Larry L. Smiley, Director
Bureau of Educational Research and Services

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INTRODUCTION

This manual is designed to provide educators, primarily administrators, with some basic legal information on issues concerning students. It was developed because of the frequency and importance of legal questions administrators have. Although the manual is not exhaustive, an attempt was made to anticipate and answer many of these questions.

The emphasis is on "students' rights" in the broad sense of that term. The "rights" discussed are (1) the right to an education, (2) the freedom of religion, (3) the rights to privacy, (4) the freedom of expression, (5) the "right" to a safe environment, and (6) the rights to substantive and procedural due process.

These topics are general in nature and the answers to many of the questions are not certain. This area is constantly developing and changing through new court decisions. Thus, any manual of this type must be limited to a jurisdiction and will become dated over time. Answers here have been given from a North Dakota perspective. To deal with

the problem of change those areas which have tended to remain constant have been given as basic rules, and have been emphasized; those areas in which there is a chance of change in the near future have been so noted.

Legal terminology and in-depth analysis of the law have been painstakingly avoided. However, citations have been included where they may have value to the reader. The citations used are of three types: court cases, statutes, and federal regulations. There are general formats used for these citations.

Cases:

Citations to cases are in the following form: Doe v. Roe, 102 S.Ct. 1126 (1982). In short this means the case in which Doe sued Roe was decided by the United States Supreme Court in 1982. The court's opinion can be found on page 1126 of volume 102 of the Supreme Court Reporter.

It is important to remember that only decisions of courts which have jurisdiction in a particular geographical area have the effect of law in that area. Thus, in North Dakota, schools are obligated to follow the decisions of the lower North Dakota court in their area, the North Dakota Supreme Court,

the federal district court in their district, the Eighth Circuit Court of Appeals, and the United States Supreme Court. Decisions of other courts are relevant only because they serve as examples of judicial reasoning and may be persuasive when the same issues are presented in a court having authority in North Dakota.

Statutes:

Citations to North Dakota statutes are in the following form: N.D.C.C. 15-42-03. In short, this means the statute mentioned can be found in the North Dakota Century Code in Title 15 (education), Chapter 42, Section 3. Most of the North Dakota statutes pertaining to education have been accumulated and bound into the Century School Code.

Federal Regulations:

Citations to federal regulations are in the following form: 45 C.F.R. 86.50. In short this means the regulations can be found in Title 45, Section 86.50 of the Code of Federal Regulations. This code is the permanent system for maintaining regulations issued by federal agencies and departments. The regulations are legally binding.

Users of this manual are reminded that it is just a guide. Although it is a serious attempt to anticipate and answer many legal questions concerning rights of students, it is not a substitute for specific legal advice.

RIGHT TO AN EDUCATION

- Do students have a right tc an education?

Although there is no federal constitutional right to an education, North Dakota children do have a state constitutional right to an education, N.D. Const. Article VIII, Section 1. However, according to federal statutes, an educational institution which receives federal funds cannot deny a person equal rights because of sex, race, religion, national origin, or handicap, Title IX, Title VII, Section 504.

- Can a class be limited to a single sex?

Sometimes. Title IX provides that children of both sexes be allowed in all classes except:

1. during parts of a class dealing with human sexuality,
2. during parts of a physical education class involving bodily contact,
3. when parts of a physical education class are grouped by proven ability,or
4. when students in music classes are grouped by vocal range.

- Must schools allow all athletics to be co-educational?

No. In North Dakota a school has three choices concerning how it will run the athletic program and what sports will be offered to students: all co-ed teams, all separate teams, or a combination thereof. Whichever the school chooses to do, it must follow the Title IX requirement that the interests and abilities of all students be taken into consideration. Both boys and girls must be equally served. Comparablility of funding, equipment, eligibility, and scheduling must be taken into consideration. If a combination of teams is offered, the school may choose which to make single sex and which to make co-ed. In making the decision, however, it must serve the interests and needs of all students and not favor those of one sex over another.

- Can a student's participation in school be limited because of a pregnancy or marriage?

No. Legal principles concerning married and pregnant students have changed drastically over the

last twenty-five years. Courts have historically sanctioned discriminatory treatment of married and/or pregnant students. They have been suspended, expelled, and denied participation in extracurricular activities. These school responses are no longer legally sanctioned. They have been found to be unconstitutional under several theories and are prohibited by Title IX.

Courts have now consistently held that students' rights to participate in school activities cannot be restricted because of marriage. Similarly, students may not be restricted because they are parents. Neither may students be restricted due to pregnancy.

Title IX regulations prohibit discrimination based on marital or parental status in schools receiving federal financial assistance, 34 C.F.R. 106.40. The regulations allow districts to offer special courses designed to address these students' special needs; but they may not be forced to enroll in classes that segregate them from other pupils. If a separate program is offered it must provide services which are comparable to the main program, 34 C.F.R. 106.40(b)(3).

- Can a school district require a doctor's release before a student is allowed to return to school after delivering a child?

School districts must treat pregnancy in the same manner as any other temporary disability or reason for hospitalization. Thus, if the school requires a release before a student can return after any hospitalization, no exception need be made for pregnancy-related hospitalizations. However, pregnancy-related hospitalizations cannot be the only ones for which a doctor's release is required.

- Can a parent or student receive damages from a school district for not providing an adequate education?

Probably not. No appellate court has yet upheld damages to a parent or student against a school for negligent instruction. The courts commonly have stated that if educational malpractice cases were allowed, they would be unable to tell if the classroom methodology was unreasonable and they would be unable to assess damages. Thus, the cause of action has not been recognized.

FREEDOM OF RELIGION

- Can we have prayer in the school if everyone agrees to it?

No. The requirement of a separation of church and state is not one of those constitutional rights an individual can waive. A school, as an arm of the state, cannot establish (promote) religion. This means schools cannot hold services or exercises which have primarily a secular or religious purpose, have a primary effect of advancing or inhibiting religion or entangle the school in religious affairs.

- Can student religious groups be allowed to meet in the school?

The answer to this question is still not clear. It is clear that a school cannot provide a sponsor and supplies for a group such as this. However, these groups on college campuses have to be treated like any other student organization. But, the standards for college and K-12 are generally quite

different. Probably a school should recognize these groups and allow them to meet just like any other student organization, except give them nothing which could appear as support--a teacher sponsor for example.

- What about a moment of silence before classes start at the beginning of the day?

Every court which has looked at this issue so far has found no difference between a period of silence and an actual period for prayer. Thus, statutes authorizing a moment of silence in the schools have been stricken as unconstitutionally promoting school prayer. The U.S. Supreme Court might make a decision on this issue during this year; this case might clear up the question. North Dakota does have a statute allowing for a moment of silence, N.D.C.C. 15-47-30.1, which has not been challenged.

- What about student-initiated prayer?

If the only difference between student-initiated prayer and school prayer is that a student instead of a teacher is leading the group in prayer, it is still unconstitutional.

- May schools conduct daily Bible reading?

Although never ruled upon by a North Dakota court, the U.S. Supreme Court decisions indicate that this practice is unconstitutional even if a nondenominational exercise. The Bible, however, can be used in the schools for purposes other than the inculcation of religion, for example as part of a literature or history lesson.

- Are Christmas programs permissible?

Yes. Christmas, like Thanksgiving, has over the years developed into a national holiday and gained a secular flavor. As such, most courts, including courts in our Circuit, have held that Christmas programs in public schools are acceptable if they are not overly religious in nature.

- May children receive religious instruction during school hours?

The schools cannot provide religious instruction in the public schools during school

hours. But, the U.S. Supreme Court has ruled that it is constitutional for public schools to let students leave their campus for religious instruction in "released time" programs. However,to be there can be no direct or indirect costs to the public school for the instruction.

Records

- What law controls the handling of student records?

Because of widespread dissatisfaction with educators' use of students' records, in 1974 Congress passed the Family Educational Rights and Privacy Act, commonly referred to as FERPA, or the Buckley Amendment. Final regulations, which really contain the essence of the procedures, were passed in 1976. FERPA stipulates that federal funds may be withdrawn from any educational agency or institution that fails to provide parents access to their child's educational records, or disseminates information to unauthorized third parties. In addition, parents and eligible students must be given a hearing to challenge the contents of records which they believe to be inaccurate.

- Who is protected by FERPA?

Parents and guardians of a student who is under the age of 18 or a dependent have all of the rights guaranteed by FERPA. A district may assume that either parent has a right of access unless a court ruling, state law, or other legal authority provides to the contrary, 34 C.F.R. 99.3, 34 C.F.R. 99.11(c).

A student acquires rights under FERPA when he/she becomes 18 years old. A student under the age of 18 may gain access to his/her records if the school chooses to permit it or the parents grant access as an authorized third party, 34 C.F.R. 99.3, 34 C.F.R. 99.4(c).

- To whom can student records be released?

A parent or an eligible student may permit any third party access to the student's educational records. The consent must be in writing, signed, and dated and must specify which records are to be disclosed. Afterward, the purpose of the disclosure and the person(s) to whom disclosure was to be made, must be specified, 34 C.F.R. 99.30.

Without parental or student consent, the following are the most common types of disclosures authorized:

1. School officials in the same district who have been determined to have a legitimate educational interest in the records, 34 C.F.R. 99.31(a)(1),

2. School officials in a district to which the student intends to transfer (after the parent has had a chance to inspect the records), 34 C.F.R. 99.31(a)(2), 34 C.F.R. 99.34,

3. Various state and national education agencies when enforcing federal laws, 34 C.F.R. 99.31(a)(3),

4. Student financial aid officials only to the extent necessary to determine eligibiity of the student, 34 C.F.R. 99.31 (a)(4),

5. Accrediting agencies, 34 C.F.R. 99.31 (a)(7),

6. In compliance with a court order after the school has made a reasonable effort to notify the parent or eligible student of the order prior to compliance, 34 C.F.R 99.31 (a)(9),

7. Appropriate persons in an emergency where such information is necessary to protect the health or safety of the student or other individuals, 34 C.F.R. 99.31 (a)(10), and

8. Public directory information may be released

to the general public. However, the school must notify parents or eligible students each year as to what information will be made available, and they may request that the school not include his/her name on the list, 34 C.F.R. 99.3, 34 C.F.R. 99.37.

- What information is covered?

FERPA requires the school to permit access to all information directly related to the student recorded in any form and maintained by the school with the primary exceptions of:

1. Notes made by a teacher in a teacher's log which are not disclosed to others, 34 C.F.R. 99.3 and

2. Physician's or psychologist's notes which are used for treatment and are not disclosed to others, 34 C.F.R. 99.3.

- What procedures are necessary?

FERPA requires a school annually to prepare a list of procedures and policies governing access to records. This policy must also include notification to parents and eligible students of their rights under the act, 34 C.F.R. 99.5, 34 C.F.R. 99.6. In addition to reasonable procedures promulgated by the school, the following general rules on inspection of records apply:

1. A school must respond to a written or oral request to inspect within a reasonable time, which is not to exceed 45 days.

2. Authorized persons are entitled to physically inspect all records regardless of their location. They may request access to all their records without having to specify in which particular records they are interested. A parent may be accompanied by another person, although a written consent form from the parent may be required by the school to allow a release to the other person.

3. A school must provide copies of the records upon a parent's request whenever: records are transferred to another school, 34 C.F.R. 99.34(a)(2), information is released to a third party, 34 C.F.R. 99.30 (d), or when denial of copies would effectively deny the right of access,34 C.F.R. 99.11(b)(2).

4. A school may charge a reasonable fee for copying but may not charge for the labor expended in searching for or retrieving records, 34 C.F.R. 99.8(a)(b).

- How do parents/students challenge the contents of an educational record?

A parent or eligible student may request that the school amend or delete any information he/she believes to be inaccurate or misleading or which violates privacy rights, 34 C.F.R. 99.20(a). If the school refuses, the parent/student may request a hearing on the issue, 34 C.F.R. 99.20(c). The hearing must be conducted within a reasonable time and must give reasonable advance notice, an unbiased hearing office, the opportunity to present evidence, the right to be represented, and a reasonably prompt decision, 34 C.F.R. 99.21(c)(d). If the ruling denies the parent's/student's request, the parent/student may place a statement of explanation into the record.

- Do all parents/students have these rights?

Yes. In addition, students in special education have further protections of privacy in their records granted by the Education For All Handicapped Children Act, Public Law 94-142. These include the right to know the date of access, procedures for a school to contest a

parent's/student's refusal to disclose records, and procedures for destruction of information.

Searches

- Can school officials search a student or a student's possessions?

Under certain circumstances. Although the Fourth Amendment prohibits unreasonable searches and seizures, it is not clear how much protection a student has against being searched or having his/her possessions searched. A student has a varying degree of expectation of privacy in his/her possessions and persons. Different courts have applied these rights in differing ways. Neither the North Dakota Supreme Court nor the U.S. Supreme Court has ruled on this matter; therefore, North Dakota students' rights are not clear. It is generally agreed, however, that although this expectation should be respected sometimes the needs of the school outweigh the student's right to privacy.

- Can't school officials search a student's locker anytime since it is really school property?

No. The protections of the Fourth Amendment do not rely on property rights. Instead, they were intended to protect a person's reasonable expectations of privacy.

- When can a school search a student's locker?

Since students usually have an expectation of privacy in the lockers, even if minimal, school officials do not have blanket authority to search them at any time or for any reason. Such a power would infringe on the student's expectation of privacy without any educational purpose to necessitate it. Before school officials can search a locker, they must have a reasonable suspicion that what they are searching for (drugs, weapons, stolen books) can be found within, and they must have a valid purpose for the search (to maintain order and discipline).

- What is a reasonable suspicion?

It is hard to define. It is more than just a

hunch. It must be based on observed facts or reliable information. It is when you have good reason to suspect what you are looking for can be found within.

- When can school officials search a student's possessions?

Since a person has a greater expectation of privacy in his/her possessions, (for example, pocketbooks or backpacks) than in his/her locker, a higher standard of proof or necessity is required before that expectation can be infringed upon. The courts have generally held that school officials, when acting to further the purposes of the school, can search a student's possessions if they have good cause to believe that which they are seeking can be found within.

- What about emergencies?

The required levels of certainty for infringing on a student's privacy decline as the necessity for the search increases due to emergencies. For example, if there were a bomb threat called into your building you could search wherever that bomb

could possibly be secreted without any individualized suspicion that the bomb was located in a certain place.

- When can the police search?

Police must strictly adhere to the requirements of the Fourth Amendement. Thus, they usually must have a warrant before conducting a search. If a warrant cannot be obtained because of the exigencies of the situation, they may search without a warrant providing they have probable cause to believe that the object sought can be found where they are searching. School officials can be held to this same standard if the primary purpose of the search is to further a police investigation.

- When can school officials search a student's body?

A search of a student's body, a strip search, is usually only considered reasonable when those conducting it have probable cause to believe that the object sought can be found in/on the student's body.

- What is probable cause?

It is a fairly high standard of certainty. You must be convinced by your knowledge of the situation (including reliable information that others have given you) that it is more probable than not that the object sought can be found where you are searching.

- Can dogs be used to detect contraband in the school?

This is another area of the law in which certainty doesn't exist. One court has found that dogs can be used to sniff lockers and automobiles without justification. However, it appears that to sniff students the school must have some counter-balancing justification, Horton v. Goose Creek Independent School District, 677 F.2d 471, (5th Cir. 1981), cert. denied, -U.S.-, 103 S.Ct. 3536 (1983). In one case, the court found that the school's concern over the increased drug traffic and negative results on the school community were sufficient to make the blanket use of dogs to sniff all of the students reasonable, Doe v.Renfrow, 475 F.Supp. 1012 (N.D. Ind 1979), op. adopted on this issue 631 F.2d 582 (7th Cir. 1980) cert. denied. 451 U.S. 1022, 101 S.Ct. 3015 (1981).

- Can evidence found during a search be used against a student?

  If the search is reasonable, any evidence found can be used against a student in a disciplinary proceeding or a court proceeding even if it was not what was expected to be found when the search was undertaken.

- Can school officials search a student if the student allows it?

  Yes. A student can waive his/her protection against unreasonable searches. However, to waive this right he/she must know of the right and voluntarily give up the protection.

- What happens if a search is found to be unreasonable?

  If the search was unreasonable any evidence found during or because of the search is inadmissible in court and probably inadmissible in a disciplinary proceeding as well. In addition, if

the school officials were not acting in good faith (knew or should have known that the search was unreasonable) they may be held liable to the student for actual and punitive damages in a Civil Rights Act (Section 1983) suit.

FREEDOM OF EXPRESSION

In General

- What is freedom of expression?

It is the provision in the First Amendment of the U.S. Constitution which guarantees that the state cannot prevent us from expressing our opinions no matter how unpopular our beliefs are. Our right to express ourselves is protected whether the communication is direct (pure speech) or indirect (symbolic speech). Indirect communication is the conveyance of the idea through nonverbal means; for example, modes of dress, colors, armbands, etc.

- When can the freedom of expression be limited?

In general, speech can be restricted by the state due to content when it is obscene, defamatory, or presents a clear and present danger. Speech or material is obscene if, taken as a whole, it:

1. appeals to the prurient interests, and

2. describes nudity or sexual conduct in a patently offensive manner, and

3. lacks serious literary, artistic political, scientific, or other values.

Speech (slander) or material (libel) is defamatory if it:

1. damages the reputation of a person,

2. is not true, and

3. was known to be false or the speaker (author) disregarded the issue of its truth.

A clear and present danger is presented, for our purposes, when the expression is fighting words or incites people.

1. Fighting words are those which, when spoken directly to a reasonable person, are clearly likely to provoke violent retaliation.

2. Statements are inciting when they are clearly and immediately likely to cause other people to violate laws or rules and they are intended to do so.

- Does this mean students can express themselves at anytime?

No. Although students have a constitutional right to freedom of expression no constitutional right is absolute. A student's right must be balanced with the state's purpose for, and extent

of, infringement on that right. In schools the state has an interest in conducting classes in a place which is safe and conducive to learning. To further that interest, a school may limit a student's freedom of expression if it disrupts the school or is harmful to students.

- When is freedom of expression disruptive enough to warrant suppression?

In the landmark case of Tinker v. Des Moines, 393 U.S. 503, 89 S.Ct. 733 (1969) the U.S. Supreme Court held that school officials cannot prohibit a particular opinion merely to avoid the argument or disturbance that always accompanies an unpopular viewpoint. However, if there is evidence that the expression would "materially and substantially" interfere with the work of the school, it can be limited.

- Does this protect students from dress codes?

Styles of dress and hair have, in some areas of the country, been found to be symbolic speech. Although we don't have a North Dakota opinion, the Circuit Court of Appeals for our federal circuit has

stricken a restriction on hair length for male students. Another court striking a similar regulation stated that students may exercise their right in the manner they see fit so long as they do not run afoul of considerations of safety, cleanliness, and decency.

- Can schools regulate speakers who come into the school?

Yes. The school is not a public forum which any citizen may use as a soap box. In fact, school officials have the authority to bar all outside speakers from school. But once a forum is provided, school officials may not bar entry because the ideas are unpopular or controversial. This is also true of other forms of school-controlled media, like bulletin boards.

Publications

- Do schools have to allow a student newspaper?

No. A school can decide whether or not to have a student newspaper. But once the decision to

sponsor a paper has been made, support cannot be withdrawn simply because school officials do not like the views expressed in it.

- Can school officials control the content of the student newspaper?

The newspaper's content can be restricted for the same purposes speech may be restricted, that is if it is obscene, libelous, disruptive to the school, or harmful to students.

- Can the school control the distribution of student newspapers?

Yes. School officials can regulate the time, place, and manner appropriate for distribution. This authority is designed, however, to prevent disruption of school activities, not to prevent distribution of the literature. These standards apply whether or not the literature is school sponsored.

- Can schools require prior submission of literature before distribution in the school?

Yes. However, approval must be based on the above standards allowing for restrictions on obscenity, libel, and material which is dangerous to students or would cause a material and substantial disruption of the school. In addition, the prior review rules must be clear and provide due process safeguards. Due process requires that the rules include: (1) a brief time during which review is to take place; (2) clearly stated standards, for example, definitions of obscenity and disruption; (3) a reasonable method for appeal; and (4) the time within which the appeal must be decided.

Curriculum/Book Selection

- Can school officials control which books are in the school library?

Yes. Since resources are limited some selection process for books must be used. However, these decisions should be based on educational value and suitability to the age groups and not be based

on an attempt to keep ideas with which the administration doesn't agree out of the library. The U.S. Supreme Court has held that the First Amendment rights include a right to learn or access information. Thus, the school's library selection policy cannot infringe on that right by "contracting the spectrum of knowledge" without an overriding school/state interest, Pico v. Bd. of Educ. of Island Trees, -U.S.-, 102 S.Ct. 2799 (1982).

- Once books have been put in the library can they be removed?

Yes, even school books do not gain tenure. They can be removed using the same criteria for initial book selection: educational suitability.

- What about books that are vulgar or offensive?

If this makes them educationally unsuitable, they do not have to be included in the library or curriculum. But, books cannot be banned just because some people find them vulgar or offensive. If this was the standard, we would probably have very few books left in the schools.

- Do students/parents then have the right to require specific courses be added to the curriculum?

No. The addition of courses to the curriculum is an educational policy issue. Clearly, in North Dakota, the legislature, the Department of Public Instruction, and the local districts have the authority to make these decisions. In addition, the courts look favorably on the schools expanding the spectrum of learning for students, since that increases their opportunities to exercise their right to receive information. Thus, even controversial courses such as compulsory sex education, have been upheld when added to the curriculum. In removing a course, educational considerations should be paramount so as to not infringe on the students' First Amendment rights.

NEGLIGENCE

- Are schools responsible for any injury a student incurs while at school?

No. Schools have a clearly established legal duty to provide students with safe facilities and adequate supervision, but this does not mean that schools are responsible every time a student is hurt. Only when the school, a teacher, or other employee fails to carry out his/her legal duty and thereby causes an injury is it possible for a student to be compensated for the injury.

- Is constant supervision necessary to fulfill the legal duty?

Not always. The amount of supervision varies with the circumstances involved including the age of the students and the activity. A teacher is only required to supervise as a reasonably prudent teacher would do under the same or similar circumstances. Thus, it may be reasonable for an

industrial arts teacher to constantly supervise students while working on saws; whereas a reading teacher may not have to supervise constantly to be reasonable.

- What is legal cause?

Just because a school, teacher, or other employee has not been reasonable in carrying out the duty owed to students does not mean that the student will recover. To recover for an injury the student must also show that the negligence (failure to be reasonable in carrying out the duty) was the cause of the injury in question. In other words, if the accident would have occurred even if there had been no negligence there can be no recovery. In addition, when there are a series of events leading to the injury, like the actions of another person, the type of injury incurred must be a foreseeable result of the negligence for it to be the legal cause of it.

- Is the school still responsible if the injured student knew of the possibility of injury?

No. If a student knows of the risks of injury

and still undertakes the activity, and the student incurs one of those possible injuries, the school is not responsible. For instance, students who are playing tennis know there is always a risk of them falling or twisting their elbows or ankles. When such an injury occurs during the normal course of a match, the school is not responsible.

- What if the student is negligent too?

If the student has acted unreasonably for a person of that age under the same or similar circumstances and causes injury to him/herself, the student should logically carry some of the burden. This concept in North Dakota is embodied in the doctrine of comparative negligence. Under this doctrine the court compares the amount of student negligence with the amount of school or teacher negligence and adjusts the amount of compensation accordingly. Thus, the student is only awarded the amount of damages necessary to compensate for the amount of the injury caused by the other party.

- If the school requires parents to sign release slips before allowing their children to take field trips or the like, is the school automatically relieved of all liability?

No. Parents cannot waive their children's claim for damage. In addition, a release given before liability arises may be meaningless, and often it is argued that this is against the public policy of encouraging safety. The school and teacher still have a duty to act with reasonable care; the waiver does not change this.

- What should a school do to protect itself from negligence actions?

There is no way a school can insure that no one will ever file a suit against it. However, in negligence actions the school or teacher will win the suit if it or he/she has acted reasonably under the circumstance. Good common sense is all that is required.

STUDENT DISCIPLINE

Codes of Conduct

- What is the extent of a school's authority in regulating student conduct?

The law is clear in its authorizing local school districts to establish and enforce student codes of conduct. Generally speaking, the rules and methods of enforcement used must be related to the educational purposes of the school, including maintaining the order and discipline necessary to conduct classes, and may not violate a student's constitutional or statutory rights. These are substantive requirements: substantive due process. In addition, schools must meet procedural requirements: rules must be known, and procedures must be in place and followed to insure that a correct decision is made: procedural due process.

- May a student be disciplined for breaking rules she/he didn't know about?

Sometimes. If the rules were generally known or if they were posted or available in student handbooks, the student can be held responsible for knowing them. All rules should be clear and understandable to ordinary students. Rules which are too vague or overly broad will not hold up either in practice or in court since students cannot tell what is expected of them.

- Do all school rules have to be written to be enforceable?

No. There are behaviors which are known to be unacceptable even if not prohibited by a written rule. School officials would be able to justify disciplinary measures in response to these behaviors.

- Can the school punish a student for unintentional acts or actions of others?

No. These responses are generally illegal under a variety of theories, generally that they

punish the individual in the absence of personal guilt, and they are arbitrary and capricious.

A leading case in this area is St. Ann v. Palisi, 495 F.2d 423 (5th Cir. 1974), where the court held that it was a denial of substantive due process to suspend a student and transfer her because her mother had struck her teacher. The Court found the school's response to the situation violated the individual's right to be punished only on the basis of personal guilt. "Traditionally, under our system of justice, punishment must be founded upon an individual's act or omission, not from his status, political affiliation, or domestic relationship."

More recently the U.S. Supreme Court used the principle under the Equal Protection clause in Plyler v. Doe, 102 S.Ct. 2382 (1982). There the court held that Texas could not exclude from the schools the children of undocumented aliens. The Court stated, "Even if the state found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of parent's misconduct against his children does not comport with the fundamental conceptions of our justice."

- Can schools regulate student off-campus conduct?

Yes. Courts have recognized that punishments imposed for student off-campus conduct must be supported by evidence that the student's off-campus behavior has an effect on on-campus activities. For any regulation of off-campus conduct it must be demonstrated that the regulation is related to the carrying out of some legitimate school function. Since a school's valid objectives are educational and generally on-campus related, any attempt to regulate off-campus student activities must be reasonably calculated to achieve some school-related objective.

The line is a difficult one to draw. Virtually any aspect of a student's life can, in one way or another, be related to his/her functioning at school. The cases seem to suggest that the more intrusive the school regulation is on a student's home and private life, the more closely related the regulation must be to the school's objectives. Courts have struck school regulations concerning off-campus distribution of literature, and off-campus alcohol regulations. But they have upheld punishment for off-campus possession of drugs, students' use of "fighting words" to a

teacher off campus,and upheld regulation of drinking or use of drugs off campus for interscholastic athletic teams, and of students driving to school.

Under the above cases and analyses, if a school wants to regulate student off-campus conduct, the best approach seems to be to write regulations concerning actual on-campus performance requirements. For instance, a requirement that a student be in a certain weight class for wrestling or selection of students for game play by ability to perform may be as effective as strict training requirements without intruding on the student's home life.

Methods of Enforcement

- Can a school lower a student's grade for cutting classes?

No. Courts have found this practice to be an improper response under two theories. The lowering of grades or loss of credit for truancy or tardiness has been successfully challenged where the legislature has authorized other responses. This argument, obviously, is only successful in those

states where the legislature has authorized other responses to truancy. North Dakota's compulsory attendance statutes do provide for penalties for nonattendance, N.D.C.C. 15-34-10.4.

Second, such policies have been held to violate substantive due process in that they are arbitrary and unreasonable. Grades which are supposed to reflect academic performance become artificially lowered for reasons unrelated to the student's academic performance. The arbitrariness is especially evident when a certain number of missed classes results in a total loss of credit. Grade reduction is apparently disciplinary when it is clearly out of proportion to that portion of the course which has been missed, particularly when class participation is only a portion of the overall grade. Policies under which students who miss a given number of class days and fail automatically are particularly hard to characterize as an assessment of class participation. Underlying all this is a question of the relationship between academic performance and attendance. Presumably, missing class should be an academic penalty in itself. If a student's test performance is unaffected by missing classes, a question is raised as to the value of classroom time and the validity of the evaluation procedures.

- Does corporal punishment violate the U.S. Constitution?

The U.S. Supreme Court has eliminated most Federal Constitutional challenges to the use of corporal punishment in schools. In Ingraham v. Wright, 430 U.S. 651 (1977), the Court held that the prohibition against cruel and unusual punishment embodied in the Eighth Amendment does not apply to corporal punishment in schools. The Court also held that corporal punishment deprives students of their liberty interest in freedom from physical restraint and physical pain. The Court, however, found that sufficient procedural protections are provided by the student's right to sue for damages or initiate criminal charges for assault and battery in state courts if the punishment is excessive. Thus, the due process interest does not entitle the student to formal notice and hearing before corporal punishment is administered. In addition, the Supreme Court summarily affirmed a case in which the lower court had held parental approval of corporal punishment was not constitutionally required.

- Is corporal punishment legal in North Dakota?

Yes. North Dakota permits its use "for the purpose of safeguarding or promoting (the student's) welfare, including prevention and punishment of misconduct, and the maintenance of proper discipline," N.D.C.C. 12.1-05-05. Most states permit the use of corporal punishment so long as it is "reasonable."

- When can corporal punishment be administered?

To fulfill the federal requirements, schools must (1) inform students in advance that unacceptable conduct may result in corporal punishment; (2) use corporal punishment as a last disciplinary resort, not as the first type of punishment; (3) administer the punishment reasonably. A student's federal due process rights are not violated when corporal punishment is administered without witnesses. To fulfill state requirements it must be administered reasonably, which does "not create a substantial risk of death, serious bodily injury, disfigurement, or gross degradation," N.D.C.C. 12.1-05-05.

- What is reasonable corporal punishment?

In assessing reasonableness, the Restatement of Torts, Second, Section 150 (1965) includes the following factors to be considered:

1. the age, sex and physical and mental condition of the child,

2. the nature of his offense and his apparent motive,

3. whether the force is reasonably necessary and appropriate to compel obedience to a proper command,

4. whether it is disproportionate to the offense, unnecessarily degrading, or likely to cause serious or permanent harm.

- What happens if corporal punishment is unreasonable?

Where corporal punishment is permissible, excessive instances can be challenged in state civil suits (assault and battery), by filing criminal assault charges, and/or by seeking disciplinary sanctions against the offending school officials.

The Supreme Court has not addressed the claim that specific instances of corporal punishment may be so excessive that they violate the student's right to substantive due process. However, a Federal Court of Appeals has held that there may be instances of corporal punishment which could give

"rise to an independent federal cause of action to vindicate substantive due process rights," Hall v. Tawney, 621 F.2d 607,611 (4th Cir. 1979).

- Don't teachers and school officials have the right to administer corporal punishment?

No. Even though corporal punishment is permissible in North Dakota by state statute, districts can still limit or prohibit its use. Failure to follow district policy does not in itself make the infliction of corporal punishment unreasonable or unconstitutional, but Courts have regularly upheld school boards' disciplining or firing of staff who were found to have violated district policies or administered corporal punishment unreasonably.

- What is a suspension?

A suspension is the deprivation of a student's right to an education for a short period of time. Suspensions include the short-term denial of school attendance as well as the denial of participation in regular courses and activities. Most legal controversies have focused on out-of-school

suspensions, but the same principles apply to any disciplinary action that removes the student from the regular instructional program for a short period of time. N.D.C.C. 15-29-08 (13) limits a suspension for a period no longer than ten days.

- Who can suspend a student?

According to N.D.C.C. 15-38-13, "a teacher may suspend any pupil from school for not more than five days." According to N.D.C.C. 15-29-08(13), the school board may make policies on suspension in which they could limit the power to suspend to the principal or with the principal's approval.

- When can a student be suspended?

According to N.D.C.C. 15-38-13 and N.D.C.C. 15-29-08 (13) a student may be suspended for insubordination, habitual disobedience, or disorderly conduct.

- What procedures are required to suspend a student?

Before a student is suspended he/she must be notified of the charge, be given opportunity to

refute the charges, and a decision must be made on the merits of the evidence. This can be done on the spot and need only take a minute or two. There is no requirement of a formal hearing.

If a teacher has suspended a student N.D.C.C. 15-38-13 requires that the teacher "give immediate notice of the suspension, and the reason, therefore, to the parent or guardian of the pupil and to a member of the school board."

- What is an expulsion?

An expulsion is the deprivation of a student's right to an education for a period longer than ten days. N.D.C.C. 15-29-08 (13) limits the length of an expulsion to the end of the current school term.

- Who can expel students?

Although a teacher or an administrator will usually initiate expulsion proceedings, only the school board can expel a student, N.D.C.C. 15-29-08.

- When can a student be expelled?

According to N.D.C.C. 15-38-13 and N.D.C.C.

15-29-08 (13) the reasons for expulsion are the same as for suspension: insubordination, habitual disobedience, or disorderly conduct. The offense, however, must be of greater severity. The following are typical infractions which may warrant expulsion if they affect the school or occur on school grounds:

1. using or encouraging others to use violence which interferes with school purposes,

2. stealing or vandalizing property,

3. possessing a weapon,

4. possessing, using, or transmitting intoxicants or drugs without a prescription,

5. failing repeatedly to comply with reasonable school directives,

6. engaging in criminal activities.

- What procedures are required to expel a student?

The Courts have recognized the following as the minimum amount of procedures required by the U.S. Constitution:

1. written notice of the charges, the intention to expel, and the place and time of the hearing with sufficient time for a defense to be prepared,

2. a full and fair hearing before an impartial party,

3. the right to legal counsel and/or some other adult representation,

4. the opportunity to present witnesses or evidence,

5. the opportunity to cross-examine witnesses,

6. a written record, and,

7. a decision based on the evidence at the hearing.

As in suspensions, the legislature or school board may adopt greater procedural safeguards; if greater safeguards are devised, they must be followed.

- Why is there a difference in procedural requirements for suspensions and expulsions?

As in almost every other conflict, courts attempt to balance the competing interests of the school against those of the students. Elaborate legal procedures for every violation would be expensive, time consuming, and cumbersome. Thus, when only a minor punishment is possible, simple procedures are acceptable. On the other hand, when a severe punishment might be possible, the balance tilts the other way. The student has a greater interest in making sure a correct decision is reached. Thus, due process requires more careful, formal, and meticulous procedures be used.

- Do these procedures apply to all students?

They apply to elementary and secondary students. The only difference in suspension and expulsion rules comes in dealing with special education students. Although special education students can be suspended, they cannot be suspended for a behavior which is related to the handicapping condition. In addition, services to special education students cannot be terminated; that is, they cannot be expelled. Students can, however, be moved to a more restrictive environment through the usual IEP process. This may be the best solution for everyone involved if the current placement does not seem to be working.

- Do students/parents have a right to use attorneys in disciplinary proceedings?

Sometimes. As a general rule in minor disciplinary matters, since there is no right to a formal hearing there is no right to be represented at the hearing. However, if the punishment is likely to be great, there is a right to a hearing and a right to be represented at that hearing. An

attorney, however, does not have to be provided for the student.

- What happens if the school does not follow these procedures?

If challenged in court, the school may be ordered to allow the student to return to school and go through the proper procedures. This may result in allowing the student to go undisciplined. In addition, if the school officials were not acting in good faith (knew or should have known that what they were doing was wrong) they may be held liable to the student for actual and punitive damages in a Civil Rights Act (Section 1983) suit.

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